Opinion and Order of the United States Supreme Court (4/29/57)

UNITED STATES SUPREME COURT

PENNSYLVANIA ET AL. *v.* BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 769. Decided April 29, 1957.

(353 U. S. 230)

PER CURIAM.

The motion to dismiss the appeal for want of jurisdiction is granted. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was taken as a petition for writ of certiorari, 28 U. S. C. § 2103, the petition is granted. 28 U. S. C. § 1257 (3).

Stephen Girard, by a will probated in 1831, left a fund in trust for the erection, maintenance, and operation of a "college." The will provided that the college was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain." The will named as trustee the City of Philadelphia. The provisions of the will were carried out by the State and City and the college was opened in 1848. Since 1869, by virtue of an act of the Pennsylvania Legislature, the trust has been administered and the college operated by the "Board of Directors of City Trusts of the City of Philadelphia." Pa. Laws 1869, No. 1258, p. 1276; Purdon's Pa. Stat. Ann., 1957, Tit. 53, § 16365.

In February 1954, the petitioners Foust and Felder applied for admission to the college. They met all quali-

fications except that they were Negroes. For this reason the Board refused to admit them. They petitioned the Orphans' Court of Philadelphia County for an order directing the Board to admit them, alleging that their exclusion because of race violated the Fourteenth Amendment to the Constitution. The State of Pennsylvania and the City of Philadelphia joined in the suit also contending the Board's action violated the Fourteenth Amendment. The Orphans' Court rejected the constitutional contention and refused to order the applicants' admission. 4 D. & C. 2d 671 (Orph. Ct. Philadelphia). This was affirmed by the Pennsylvania Supreme Court. 386 Pa. 548, 127 A. 2d 287.

The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. *Brown* v. *Board of Education,* 347 U. S. 483. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Opinion and Order of Philadelphia Orphans' Court (9/11/57)

GIRARD ESTATE—PHILA. ORPHANS' COURT
(7 FIDUCIARY REP. (PA.) 555)

OPINION BY KLEIN, P. J., SEPTEMBER 11, 1957:

This matter is again before us as the result of a mandate of the United States Supreme Court and an order of the Supreme Court of Pennsylvania entered pursuant thereto.

The United States Supreme Court, in its per curiam opinion dated April 29, 1957, states:

> "The Board* which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR 2d 1180. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

On June 28, 1957, the Supreme Court of Pennsylvania entered the following order:

> "The decrees of the Orphans' Court of Philadelphia County are vacated at the appellee's costs and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its mandate."

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*Referring to the Board of Directors of City Trusts of the City of Philadelphia.

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It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to the trust and not the trust to the trustee. We know of no decision of any court in the English-speaking world which challenges this rule of law. As a matter of fact, the Supreme Court of the United States, on two previous occasions in litigation dealing with the estate of the present testator, clearly indicated its adherence to this principle.

When this will was before the United States Supreme Court for the first time in *Vidal et al. v. Stephen Girard's Executors,* 43 U. S. (2 Howard) 127, 188, that court said:

> "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation [here the City of Philadelphia] was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

Again, in *Girard v. Philadelphia,* 74 U. S. (7 Wallace) 1, 12, the court stated:

> "Now, if this were true [that the city could not act as trustee] the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee."

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In the course of the present proceedings, the Supreme Court of Pennsylvania, in a scholarly, well-reasoned opinion, carefully and fully reviewed the law and concluded (386 Pa. 548, 566):

> "But finally, even if the Board of Directors of City Trusts *were* deemed to be engaged in 'State action' in the administration of the Girard trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee."

The Supreme Court of the United States has ruled, as a matter of federal constitutional law, that the Board of Directors of City Trusts of the City of Philiadelphia is an agency of the State of Pennsylvania and consequently forbidden by the Fourteenth Amendment from operating, even as a trustee of private funds, an establishment which excludes all but "poor white male orphans." This is the sole issue decided by that court. It did not rule, either directly or indirectly, that the testator's express wishes were to be disregarded and that the two Negro applicants were to be admitted to Girard College.

Stephen Girard, himself, and both appellate courts have defined the primary object of the trust to be the creation of

an institution for "poor male white orphan children." The Supreme Court of Pennsylvania, which is the final arbiter of our state law, has unequivocally stated that if, for any reason, the Board of Directors of City Trusts of the City of Philadelphia cannot continue to administer the trust in accordance with testator's directions, it becomes the duty of this court to remove it as trustee and to appoint a substituted trustee which can lawfully administer the trust in the manner prescribed by the testator.

Our course has been clearly charted. The highest appellate courts of the nation and of this state have set forth the principles of federal law and state law, respectively, which we must follow in finally disposing of the petitions which are the basis of this litigation.

In order to harmonize the opinions of the United States Supreme Court and the Supreme Court of Pennsylvania, we hold: (1) that the primary purpose of the testator to benefit "poor white male orphans," only, must prevail; and (2) that the disqualification of the Board as trustee of this estate by the United States Supreme Court requires us to remove it from the administration of the trust and to appoint a substituted trustee, not so disqualified.

Accordingly, we reaffirm our previous ruling that William Ashe Foust and Robert Felder are not eligible for admission to Girard College because they are not "poor white male orphans."

We, therefore, enter the following

DECREE

AND NOW, this 11th day of September, 1957, in obedience to the mandate of the United States Supreme Court dated June 11, 1957, and the order of the Supreme Court

of Pennsylvania filed June 28, 1957, and in conformity with the opinion of the Supreme Court of Pennsylvania, dated November 12, 1956, it is hereby ordered and decreed that:

1. The petitions of William Ashe Foust and Robert Felder for admission to Girard College are dismissed.

2. The Board of Directors of City Trusts of the City of Philadelphia is removed as trustee of the estate of Stephen Girard, deceased, effective upon the appointment of a substituted trustee by this court.

3. The Board of Directors of City Trusts of the City of Philadelphia is directed to transfer and deliver the records and assets of the estate of Stephen Girard, deceased, to the substituted trustee, promptly, after such substituted trustee has been appointed and duly qualified.

4. The Board of Directors of City Trusts of the City of Philadelphia is directed to file an account of its administration of the estate of Stephen Girard, deceased, within six months after the date of this decree.

Opinion and Order of Supreme Court of Pennsylvania (1/24/58)

PENNSYLVANIA SUPREME COURT

GIRARD COLLEGE TRUSTEESHIP.

(391 Pa. 434, 138 A. 2d. 844)

OPINION BY MR. CHIEF JUSTICE JONES, January 24, 1958:

When this matter was here before, we affirmed the action of the Orphans' Court of Philadelphia County denying admission to Girard College to William Ashe Foust and Robert Felder, poor male Negro orphans, for the reason that the will of Stephen Girard, the founder and endower of the College, expressly restricts admission to "poor male white orphans": see *Girard Will Case,* 386 Pa. 548, 551, 127 A. 2d 287. Although the institution is referred to as a College, the testator himself aptly termed it an "Orphan Establishment" in one of two codicils which, with the decedent's will, were probated shortly after his death in 1831.

The will nominated and appointed as trustee of the charity the Mayor, Aldermen and Citizens of Philadelphia, the then corporate title of the City, which duly entered upon its trust duties. But, for years, the College has been administered by the Board of Directors of City Trusts of Philadelphia, a body statutorily created by the Act of June 30, 1869, P. L. 1276. The Act empowered the Board to accept and execute charitable trusts bequeathed to the City of Philadelphia, as trustee, whereof a large number, following Girard's lead, had come into existence: see *Philadelphia v. Fox,* 64 Pa. 169, 172 et seq. For the proper administration of the trusts committed to it, the Board of

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City Trusts is accountable to the Orphans' Court of Philadelphia County: *Wilson v. Board of Directors of City Trusts,* 324 Pa. 545, 188 A. 588. That court, deeming the Board of City Trusts to be like any other trustee which is a creature of statute and authorized to accept and administer private trusts, held by its decrees, which we affirmed, that the Board of City Trusts was bound to abide faithfully by the restrictions which Girard's will imposes on admissions to the College.

However, the Supreme Court of the United States reversed our judgment of affirmance and remanded the cause for further proceedings not inconsistent with that Court's opinion which held that the Board of City Trusts is an agency of the State of Pennsylvania and that, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the College because they were Negroes was discrimination by the State which is forbidden by the Fourteenth Amendment, citing *Brown v. Board of Education,* 347 U. S. 483: see *Pennsylvania v. Board of Trusts,* 353 U. S. 230.

In obedience to the Supreme Court's mandate, we vacated the decrees of the Orphans' Court and remanded the cause to that court "for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its said mandate," a true and correct copy thereof being appended to our order of remand.

The Orphans' Court, construing the Supreme Court's opinion to mean no more than that the Board of City Trusts was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of its founder, entered decrees removing the Board as trustee of

Girard College and substituting for that purpose thirteen private citizens none of whom holds any public office or otherwise exercises any governmental power under the Commonwealth of Pennsylvania or any of its political or municipal subdivisions. It is these decrees which are now before us for review on the separate appeals of Foust, Felder, the Commonwealth of Pennsylvania and the City of Philadelphia (the State and City having voluntarily become parties to the proceedings). Simply stated, the question for decision is whether the action of the Orphans' Court is inconsistent with the opinion of the Supreme Court of the United States.

It is the appellants' contention that the Supreme Court's mandate required the Orphans' Court to order the Board of City Trusts to admit Foust and Felder to Girard College forthwith. With that, we cannot agree. Had the Supreme Court so intended, it would have said so just as it did in *Sweatt* v. *Painter*, 339 U. S. 629 (1950), where there was involved a state-supported University's denial of admission to a Negro because of his race. The order of reversal in the *Sweatt* case also included a remand of the cause for further proceedings not inconsistent with the Supreme Court's opinion but, immediately preceding, and as a part of the order of reversal, there is the specific ruling by the Court that "the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School." The mandate in the instant case contains no such directive.

The appellants' effort to make a "segregation" issue out of Stephen Girard's private charity, merely because of the inability of the Board of City Trusts, as trustee, to comply with the donor's express directions, serves only to confuse and obscure the real issue involved as to the right of a pri-

vate individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced. In *Holdship* v. *Patterson*, 7 Watts 547, 551 (1838), Mr. Chief Justice GIBSON pertinently stated that a testamentary benefactor "has an individual right of property in the execution of the trust, and to deprive him of it would be a fraud on his generosity. To appropriate a gift to a purpose *or person* not intended, would be an evasion of the donor's private dominion" (Emphasis supplied). As lately as *Borsch Estate*, 362 Pa. 581, 586, 67 A.2d 119 (1949), we recognized, as constitutionally safeguarded, the right of a benefactor to have enforced the limitations and restrictions affixed to his testamentary gift. The exercise of that right is but one of the manifestations of the right of private property which is fundamental to our social, economic and political order and whose preservation unimpaired is as vital to our Negro citizens as it is to their white breathen.

As we read the Supreme Court's opinion, what it holds, and all that it was presumably intended to hold, in view of what was then before the Court, is that the Board of City Trusts, being a State agency, is incapable of administering Girard College in strict compliance with the founder's prescribed racial restriction on admissions without being guilty of a violation of the Fourteenth Amendment. However, the supreme Court did not say that there is any Constitutional or other legal barrier to the removal of the Board of City Trusts as trustee of Girard College in order that the Orphanage can be administered in accordance with all of the testator's express directions including the qualifications for admission to the student body. On

the other hand, there is high authority for such procedure where a trustee is either unable or fails or refuses to administer a trust in accordance with the lawful directions of the settlor.

In *Vidal et al.* v. *Girard's Executors,* 43 U. S. (2 Howard) 126, 188 (1844), which was concerned with an attempt by Stephen Girard's heirs to nullify the Girard Trust, one of the grounds of attack was that the City of Philadelphia, a municipal corporation, was legally incapable of executing the trust. In rejecting this contention Mr. Justice Story, speaking for the Supreme Court, said: "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

Subsequent to the "Consolidation Act" of February 2, 1854, P. L. 21, which enlarged the physical area of the City of Philadelphia by incorporating therein outlying territory, Girard's heirs renewed their attack on the trust. The case again went to the Supreme Court of the United States where it was argued that the "Consolidation Act" had "either dissolved or destroyed the identity of the original corporation [City of Philadelphia], and it is consequently unable any longer to administer the trust." Mr. Justice Grier, who delivered the opinion of the Court, said, "Now, if this were true [that the City could no longer act as trustee of the Girard Estate], the only consequence would be, not that the charities or trust should fail, but

that the chancellor should substitute another trustee": *Girard* v. *Philadelphia,* 74 U. S. (7 Wall.) 1, 12, 13 (1868).

The inability of the Board of City Trusts to apply constitutionally the racial criterion prescribed by the testator for admissions to Girard College affects *the trustee* and *not the trust.* As the opinion for the Orphans' Court so well states, "It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to the trust and not the trust to the trustee." It necessarily followed, therefore, that the course to be pursued in order that the trust may continue to be fully effectuated in accordance with the benefactor's intent was not to obliterate by judicial fiat an express term of his will which, as a private individual, he had a legal right to impose (see *City of Philadelphia* v. *Girard's Heirs,* 45 Pa. 9, 26) but for the court, which has jurisdiction of the trust and its fiduciary, to appoint substitute trustees capable of carrying out the testator's lawful prescriptions. And, that is precisely what the Orphans' Court has done.

The appellants argue, however, that "As a result of legislative implementation and City management, Girard College has taken on a public character" and must, therefore, be administered as a public charity by a public body subject to the inhibitions of the Fourteenth Amendment. We are unable to perceive the slightest basis for the contention either in Girard's will or in legislation passed in relation to the Girard Estate.

The testator's primary and dominant object was to found a private charitable institution for the training, education

and maintenance of poor male white orphans. Thus, his will expressly declares: " . . . I am *particularly desirous* to provide for such a number of *poor male white orphan children,* as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of *public* funds . . ." He directed that certain physical things be done on the land he devised for the College "so that the establishment [i.e., the College] may be rendered secure and *private.*" And, upon devoting, secondarily, specified income from the trust fund to the promotion of the prosperity of the City and the health and comfort of its inhabitants, the testator directed that such income should be applied yearly for the indicated purposes but only "after providing for the College as hereinbefore directed, as my *primary object*" (all emphasis above supplied).

It is not possible to read Girard's will without being deeply impressed with the fact that it was *the College, as a private charity,* and *not the trusteeship of the City,* that was the primary object of the donor's testamentary scheme. Of course, a trustee was a necessary and unavoidable incident of the trust, and the testator, desiring the continuity of the institution, availed himself of the services of the only existing local corporate body capable of administering the trust in perpetuity. What the will so clearly reveals as to the intended paramountcy of the private charity has long since been judicially recognized. In *Girard* v. *Philadelphia,* supra, the Supreme Court of the United States spoke of the College, just as the testator had done, as the "primary object" of the three objects to which the income of the whole residuary estate was to be devoted. Cf. also *Vidal et al.* v.

Girard's Executors, supra. And, in *City of Philadelphia* v. *Girard's Heirs,* supra, this Court, in construing the Girard will, declared that its dispositive portion was "a devise of all the residue of his real and personal estate to the city of Philadelphia, an existing corporation, in trust, as his 'primary object', to construct, furnish, constitute, and maintain the institution now known as the Girard College . . ."

The private character of the trust and the privacy of the Orphanage which the trust was established to maintain and administer were aptly described in *Girard Will Case,* supra, as follows: "All provisions of the will show that it was not intended to be a public school; indeed, it is not merely a school at all but what Girard himself called in a codicil to his will, an 'Orphan Establishment,' a home where the fatherless boys eat, sleep, study and live together, enjoying the testator's bounty which provides for them not only an education but also lodging, board, clothing and all the necessities of life. . . . Girard College is a comparatively large institution, but no different legal principles apply to it for that reason than to the smallest of private schools. It is erected on land owned by Girard and the buildings were constructed with his own funds. . . . The college has been supported and maintained for now over a century by Girard's estate; not a penny of State or city money has ever gone into it; no taxpayer has ever been called upon to contribute to it; true, it is exempt from local taxation, but so are all other charities even though restricted as to their beneficiaries and managed by private trustees."

The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate. Certain it is that no additional legislation was

required to clothe the City with the fiduciary powers necessary for the administration of Girard College. The Supreme Court said in this very connection in *Vidal et al.* v. *Girard's Executors,* supra: "We think, then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania." The legislative enactments which the appellants stress were designed in large part to enable the Commonwealth and the City to receive and use for their governmental purposes pecuniary legacies bequeathed directly to them by Girard's will. The rest of the legislative enactments were purely administrative measures neither envisioned nor required by Girard's will. And, the same can be said for the ordinances which the appellants cite.

What Mr. Chief Justice LOWRIE so clearly recognized for this court in *Philadelphia* v. *Girard's Heirs,* supra, is peculiarly apposite here: "In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that

are intended for adaptation to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency."

Little less than startling is the suggestion that the State or City could, by legislation enacted by either of them after Girard's death, alter or affect the terms of his will respecting the creation and administration of Girard College which did not call for or require legislation to make it an operating charitable institution. There is nothing in the testator's will or in any legislation by the Commonwealth or the City that serves to make Girard College a public charity or that requires that it be publicly administered. On the contrary, we hold, on the basis of the compelling testamentary evidence, already noted, that Girard College is a private charity capable of being lawfully administered by private trustees.

In removing the Board of City Trusts as trustee of Girard College and in substituting the private individuals as trustees for that purpose, the Orphans' Court acted well within its jurisdiction and powers. It has had jurisdiction over testamentary trusts at least since the Act of March 29, 1832, P. L. 190, § 4: see *Wilson* v. *Board of Directors of City Trusts,* 324 Pa. 545, 548, 188 A. 588, where it was said that "Whatever may have been the uncertainty as to the jurisdiction of the orphans' court prior to 1832, the Act of March 29, 1832, P. L. 190, Section 4, and the decisions which followed it, cleared away. It provided that the jurisdiction of the several orphans' courts shall extend to and embrace trustees who are accountable in any way for the property of a decedent." It has also had jurisdiction over trusts for the benefit of orphans since the Act of March 27, 1713, 3 Pa. Stat. at Large 14, Chap. 197.

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The Fiduciaries' Act of April 18, 1949, P. L. 512, § 331(5), which is the presently applicable statute, confers exclusive power on the Orphans' Court to remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." Over and above such statutory power, it has long been established that the Orphans' Court possesses the power of a court of chancery in aid of an exercise of its jurisdiction: see *Stevens's Estate,* 200 Pa. 318, 322, 49 A. 985. What was said there in the opinion of the court below, whereon this court affirmed *per curiam,* is presently so pertinent as to justify the following quotation: "The courts of Pennsylvania have looked with favor upon charities, and the law of the state, as administered from the beginning of this province, has always been broad enough to discern the objects of every charity and to preserve and enforce it, notwithstanding any defect, such as want of power in the trustees or otherwise: The Apprentices' Fund Case, 13 Pa. C. C. Rep. 241. Therefore, when a charity is established in any manner, such a slight impediment as a defect or want of power in the trustee to execute it does not stand in the way; the charity remains; the trustee is declared incapable of acting, and a competent trustee is appointed in his place. Chancery here steps in to enforce it and commits it to some one who may lawfully administer it: Frazier v. St. Luke's Church, 147 Pa. 256."

The contention which the appellants advance that the Act of 1869, supra, which created the Board of Directors of City Trusts, divested the Orphans' Court of any power to remove the Board of City Trusts as trustee is utterly lacking in merit. As this court recognized in *Philadelphia* v. *Fox,* 64 Pa. 169, 183 (1870), all that the Act of 1869

did was to make a change in the internal organization of the municipality by providing that one class of its functions (i.e., as fiduciary for private charities) should be administered in a manner different from what it had been theretofore. In *Wilson* v. *Board of Directors of City Trusts*, supra, where the Orphans' Court was held to possess plenary powers over trusts administered by the Board of City Trusts, it was pointed out that "The Act [of 1869] in no way ousted [the Orphans' Court's] jurisdictional control, and the fact that [the Act] required reports to be made to the City Council and others did not divest the orphans' court of the normal control that it had hitherto exercised over all trust estates created by will. Its power has been recognized since the passage of that Act."

No useful purpose would be served by discussing at greater length the jurisdiction of the Orphans' Court over testamentary trusts and their fiduciaries or the power of that court to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed. Such a situation calls for the removal of the incapable trustee and the substitution of a fiduciary able to administer the trust as its provisions require; and the jurisdiction and power of the Orphans' Court to that end is not open to question. Here, there is a conclusively adjudicated want of capacity in the Board of City Trusts to administer Girard College in accordance with the intention and directions of the testator's will. There was, therefore, nothing other for the Orphans' Court to do in the circumstances but to remove the inhibited trustee and appoint trustees capable of administering the College as Stephen Girard intended and prescribed.

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The appellants assert that the action of the Orphans' Court in removing the Board of City Trusts and in substituting therefor trustees capable of administering Girard College in accordance with the settlor's directions constituted State action which denied to the minor applicants the equal protection of the laws guaranteed them by the Fourteenth Amendment. As support for this contention, they cite *Shelley* v. *Kraemer,* 334 U. S. 1, and *Barrows* v. *Jackson,* 346 U. S. 249. The pertinently distinguishing feature of those cases is that in each of them it was a *constitutionally guaranteed right* of an individual that was subjected to the inhibited discrimination based on race or color. No such right is involved here, as we believe will clearly appear.

Concededly, it has long been authoritatively established that an official act of a member of a State's judiciary constitutes State action within the contemplation of the Fourteenth Amendment. No one will gainsay that. See *Ex Parte Virginia,* 100 U. S. 339; also, *Shelley* v. *Kraemer* and *Barrows* v. *Jackson,* supra. The fallacy in the appellants' argument lies in the fact that the complained-of discrimination in the instant case does not impinge upon any *civil right* to which the minor petitioners have a constitutional claim along with all other members of the community. Not coming within the qualifications required by Stephen Girard's will for admission to his Orphanage, the present applicants have no right to be beneficiaries thereof in defiance of the settlor's plainly expressed and legally valid testamentary provisions. Neither *Shelley* v. *Kraemer* nor *Barrows* v. *Jackson,* supra, teaches otherwise.

On the contrary, in *Shelley* v. *Kraemer,* where a party to a racially restrictive agreement relative to private prop-

erty sought equitable enforcement of the covenant against Negro purchasers of portions of the restricted property, the Supreme Court took occasion to observe, first of all, that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property" and then declared that "Equality in the enjoyment of property rights . . . [is] an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." The undisputed facts in the *Shelley* case made it clear that, but for the active intervention of the State court, the Negro purchasers would have been free to occupy the properties in question without restraint. Thus, the State had made available to the covenantees the full coercive power of government to deny to the Negro purchasers, on the ground of race or color, their constitutional right to own and enjoy property which they were willing and financially able to acquire and which the grantors were willing to sell. As contrasted by the Supreme Court, "The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to the petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." In the instant case, no one not possessing the qualifications prescribed by Girard's will for admission to the Orphanage can claim any right that entitles him to share Stephen Girard's largesse on an equal, or any, footing with those whom Girard himself expressly made the beneficiaries of his bounty.

Barrows v. *Jackson* was also a suit by a covenantee of a racially restrictive agreement, brought to recover from a

breaching covenantor the contractually stipulated damages due for selling restricted property to a Negro. The only parties to the suit were the signatories to the restrictive agreement. No attempt was made to enjoin the Negro purchaser from enjoying the property which he had so acquired. The State court, on the rationale of the *Shelley* case, denied the plaintiff a recovery. The Supreme Court, in affirming the judgment of the State court, reasoned as follows: "To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. . . . If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant."

Thus in *Barrows,* just as in the *Shelley* case, although in a different form of action, it was the supplicated judicial enforcement of a claim arising out of a racially restrictive covenant in impairment of a Negro's constitutionality guaranteed civil right that was deemed to be discrimination by State action which the Fourteenth Amendment inhibits. This seems plain enough, for immediately after referring to the effects of the restrictive covenant on the owner's exercise of her property rights, the Supreme Court at once said, —"The next question to emerge is whether the state action in allowing damages deprives anyone of rights protected by the Constitution". Thereupon, the Court concluded that the State action did so operate, saying,—"If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may in-

cur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment. See *Shelley,* supra."

Nowhere in *Shelley* v. *Kraemer* or in *Barrows* v. *Jackson* did the Supreme Court denounce as void the restrictive covenants respectively involved in those cases. Such covenants are recognized as valid *inter partes* so long as they are adhered to voluntarily. Notwithstanding the discriminatory nature of a covenant restricted on the basis of race or color, no one can compel the covenantor to sell his property in violation of his restrictive agreement or otherwise force him to desist from abiding by his covenant. To do so would be to invade *his* constitutionally guaranteed right of dominion over his own property. And, that would be no less true of Stephen Girard's trust were we to hold that, because of his testamentary limitation on admissions to Girard College to "poor male white orphans", he has been guilty of an unconstitutional discrimination by virtue of the Fourteenth Amendment, wherefor all *poor male* orphans, regardless of color, are eligible for admission to that institution.

The elements which brought the "equal protection" clause of the Fourteenth Amendment into play in *Shelley* v. *Kramer* and *Barrows* v. *Jackson* consisted of State action for the enforcement of a discrimination based on race or color in impairment of a constitutionally protected right of an individual to which he, along with all other members of the community, is entitled as a matter of public law. It is

plain enough from the words of the Fourteenth Amendment that it is "laws", and not claims under some private testament, whereof the Amendment guarantees everyone "equal protection". Manifestly, therefore, an element essential to the invocation of the "equal protection" clause of the Fourteenth Amendment is absent in this case.

We are not unmindful that, when the Supreme Court reversed our former action in this case and remanded the record for further proceedings not inconsistent with its opinion, there was likewise present only the action of the State agency as trustee of Girard College and the racial discrimination on admissions imposed by Girard's will which the trustee was enforcing. In short, then as now, there was no violation of a constitutionally protected right possessed alike by everyone. We have already indicated our belief that had the Supreme Court intended that the court below, having jurisdiction and supervisory control over the trustee of Girard College, should admit the Negro applicants forthwith, it would have plainly said so just as it did in *Sweatt* v. *Painter,* supra. This deduction is, of course, a negative approach to the intended scope of the Supreme Court's ruling. Our positive interpretation of it is that *a State agency,* even when acting as the trustee of a private charity, can have *no part* in the enforcement of a racially discriminatory restriction regardless of what type of rights it affects. It need hardly be remarked that, had our study of the Supreme Court's opinion led us to the conclusion that no trustee, other than the Board of City Trusts, can lawfully administer Girard College, we would have been alert to carry out the ruling to the full extent of its implications.

Furthermore, if all that is necessary to constitute a denial of equal protection of the laws in violation of the Four-

teenth Amendment is State action and a racial or religious discrimination, then no private charity created by will can any longer dispense its benefits on the basis of race, creed or color according as its settlor has stipulated. A will is without any force or effect whatsoever until it is probated. This is so elementary as not to require citation of authority; and, equally fundamental it is that the admission of a will to probate constitutes judicial action whether it be by the register, the surrogate or some other officer thereunto authorized by law. It is plain enough, therefore, that State action is necessary to effectuate a will which creates a private charity whose benefits are dispensed on the basis of race, creed or color. What keeps such a charity, so created and restricted, from constituting a violation of the "equal protection" clause of the Fourteenth Amendment is that no one who does not come within the settlor's definition of beneficiary has a constitutionally protected right (or any right for that matter) to share in the charity's benefits.

Further dissimilarity between the *Shelley* and *Barrows* cases on the one hand and the instant case on the other is in the fact that in the former cases the full power of the State by way of court enforcement of the racially restrictive covenants was sought and relief refused, while in the present instance all that has happened is that, in the course of the proceeding instituted by the two Negro boys for admission to Girard College, the Orphans' Court, having been authoritatively advised that the Board of City Trusts is incapable of administering Girard College as its founder directed, removed the incapable trustee and appointed other fiduciaries who can administer the College in the manner Stephen Girard prescribed. In so doing the Orphans'

Court did no more than it would do in any case upon ascertaining that a trustee was no longer capable of discharging his fiduciary duties competently and adequately.

The appellants argue, however, that, because the substituted trustees will continue to restrict admissions to Girard College to poor male orphans of a particular race, whom Girard by his will specified as alone eligible for admission, the action of the Orphans' Court will deny the present applicants of a different race the equal protection of the laws guaranteed them by the Fourteenth Amendment. In aid of this argument, the appellants unwarrantedly charge that the Orphans' Court's exercise of its judicial power in the premises was "for the sole purpose of excluding Negroes from Girard College" and that the action "was taken solely in order to enable the school to remain segregated." The Orphans' Court did not act to *exclude* Negroes from Girard College. None had ever been admitted. What the Orphans' Court did was to refuse to admit the Negro applicants because they did not qualify for admission under the terms of Girard's will. And, to speak of Girard College as remaining "segregated" as a result of the Orphans' Court action is to use a term whose present-day stigmatizing connotation has no proper place in this case.

The appellant City persists in its complaint that it was denied procedural due process by the Orphans' Court's entry of its decrees, after the remand, without further hearing before that court. Brief reference to the procedural steps pursued in this litigation will at once disclose that all parties have been fully heard. Hearings on the petitions of Foust and Felder were held for days before the Orphans' Court where testimony was taken *in extenso* and the matter thoroughly argued by counsel. Exceptions

to the hearing judge's decrees were filed and thereafter argued by counsel for appellants before the court sitting *en banc*. Following entry of the final decrees, the matter was appealed to this court and then carried to the Supreme Court of the United States. When the cause was lately remanded to the Orphans' Court pursuant to the Supreme Court's mandate, there was no occasion for any further hearing in the matter. The record was complete. It was the duty of the Orphans' Court, just as it is our duty now, to proceed in a manner not inconsistent with the opinion of the Supreme Court. And, that, we think we are doing.

The decrees are affirmed at the cost of the Commonwealth of Pennsylvania and the City of Philadelphia.

United States Supreme Court's Dismissal of Appeal and Denial of Certiorari (6/30/58)

UNITED STATES SUPREME COURT
PENNSYLVANIA ET AL. v. BOARD OF DIRECTORS OF CITY TRUSTS OF PHILADELPHIA ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 947. Decided June 30, 1958.
(357 U. S. 570)

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Pennsylvania Act of November 19, 1959, P. L. 1526, 20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9

No. 538

AN ACT

Relating to property held for minors by political subdivisions; prescribing procedures for the substitution of fiduciaries; granting powers and imposing duties on the Orphans' Court; and authorizing such substituted fiduciaries to establish and maintain common trust funds for the investment and reinvestment of the moneys of the estates of minors of which they may be guardians; providing for the administration of funds so established; and prescribing the nature and kinds of investments which may be made therein.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Whenever property is held by any political subdivision of this Commonwealth in a fiduciary capacity for a minor or minors and it shall appear, from petition filed in the Orphans' Court of the county wherein the political subdivision is situate, to be in the public interest that such fiduciary relationship be terminated and a substitute fiduciary or fiduciaries be appointed in its place and stead, the Orphans' Court shall have the power to direct the filing of an account or accounts and to order the discharge of said political subdivision as fiduciary.

Section 2. The Orphans' Court, by such orders and decrees as may be deemed necessary and after such notice as the court may direct, shall appoint a substitute fiduciary

or fiduciaries as guardian of the property and estate so distributed, and such appointee shall also act as a like guardian of the property and estate of other minors whose custody is thereafter committed to such fiduciary or fiduciaries by the natural mother, guardian or next of friend of such minors as evidenced by a written instrument giving and granting consent to such custody.

Section 3. The guardian, when so appointed, shall be the guardian of every such minor and shall be entitled, in like manner as other guardians, to demand and receive any effects or property from any person having possession thereof or owing the same, and to give receipts therefor. It shall be the duty of the guardian to take care of the same as guardian, and to make the same productive as far as reasonably can be, and to deliver and pay over the same with the increase, to the orphan on his attaining the age of twenty-one years, or to his legal representatives if he shall die before attaining that age.

Section 4. The court may make such orders and decrees as may be necessary to transfer any property interest, and such orders or decrees shall be authority to all transfer agents and others to transfer securities or other property interests held by the fiduciary.

Section 5. Any guardian so appointed and charged with the administration of such estates of such minors may establish and maintain one or more common trust funds for the collective investment and reinvestment of the moneys of any such estate; Provided, That the assets comprising such common trust fund consist solely of assets of the class

authorized by law as investments for funds held by fiduciaries.

Section 6. Such guardian shall invest the moneys of the estate of any such minor in such common trust fund by adding the same thereto and by apportioning a participation therein to such estate of any minor of which it may be guardian in the proportion that the moneys of the estate added thereto bears to the aggregate value of all the assets of such common trust fund at the time of such investment, including in such assets the moneys of the estate so added. The withdrawal of a participation from such common trust fund shall be on a basis of its proportionate interest in the aggregate value of all the assets of such common trust fund at the time of such withdrawal. The participating interest of any estate in such common trust fund may, from time to time, be withdrawn, in whole or in part, by the guardian. Upon such withdrawals, the guardian may make distribution in cash or ratably in kind, or partly in cash and partly in kind. Participations in such common trust fund shall not be sold to any other corporation or person.

Section 7. If a bond or other obligation for the payment of money is acquired as an investment for any such common trust fund at a cost in excess of the par or maturity value thereof, the guardian may, during but not beyond the period that such obligation is held as an investment in such fund, amortize such excess cost out of income on such obligation by deducting from each payment of income and adding to principal an amount equal to the sum obtained by dividing such excess cost by the number of periodic payments of income to accrue on such obligation from the date of such acquisition until its maturity date.

Pennsylvania Act of November 19, 1959, P. L. 1526
20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9.

Section 8. The guardian shall designate clearly upon its records the names of the estate of a minor on behalf of which such guardian owns a participation in any such common trust fund and the extent of the interest of the minor's estate therein. No such estate shall be deemed to have individual ownership of any assets in such common trust fund but shall be deemed to have the proportionate undivided interest in the common trust fund. The ownership of the individual assets comprising any such common trust fund shall be solely in the guardian.

Section 9. No mistakes made in good faith and in the exercise of due care and prudence in connection with the administration of any such common trust fund shall be held to exceed any power granted to, or violate any duty imposed upon, the guardian if promptly after the discovery of the mistake the guardian takes whatever action that may be practicable under the circumstances to remedy the mistake.

Section 10. The following act and parts of act and their amendments are repealed to the extent hereinafter specified:

(1) The act of February 27, 1847 (P. L. 178), entitled "An act relative to the Girard college for orphans," absolutely.

(2) Section 6, act of April 20, 1853 (P. L. 623), entitled "An act to incorporate the Beneficial Saving Fund society of Philadelphia; relative to the Girard College for Orphans; and to a vacation of Turner's lane to Schuylkill Third Street, in Penn district, Philadelphia county," absolutely.

Pennsylvania Act of November 19, 1959, P. L. 1526
20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9.

(3) Section 1, act of June 30, 1869 (P. L. 1276), entitled "A further supplement to an act, entitled 'An act to incorporate the city of Philadelphia,' approved the second of February, one thousand eight hundred and fifty-four, creating a board called directors of city trusts," in so far as it relates to the control and management of the persons of any orphans.

(4) All other acts and parts of acts in so far as they are inconsistent herewith.

Section 11. This act shall take effect immediately.

APPROVED—The 19th day of November, A. D. 1959.

DAVID L. LAWRENCE

Opinion and Order of
United States District Court (E. D. Pa.) (7/5/67)
(270 F. Supp. 782)

OPINION

July 5, 1967

JOSEPH S. LORD, III, J.

This action[1] arises out of a claim by seven Negro male orphans,[2] the City of Philadelphia, the Commonwealth of Pennsylvania, and the Attorney General of Pennsylvania that the continued exclusion of non-white applicants to Girard College by the defendant Trustees is constitutionally impermissible under the Equal Protection Clause of the Fourteenth Amendment. We earlier determined that this Court has jurisdiction. This ruling was in no way disturbed by the Court of Appeals.

We now hold that the plaintiffs have sustained their burden of proving unconstitutional State action and that, accordingly, the relief requested must be granted.

Plaintiffs' primary contention[3] centers on the appointment by the Orphans' Court in 1957 of substitute trustees to administer Girard College. The constitutional question

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[1]For earlier proceedings, see 260 F. Supp. 323; 260 F. Supp. 358, *vacated*, 373 F. 2d 771. Stephen Girard willed substantial property to the City of Philadelphia in trust to be used for erection and operation of a primary and secondary boarding school for poor, male, white orphans. The school is known as Girard College. The individual plaintiffs seek admission although they are not white.

[2]Under Pennsylvania law, an orphan need only be fatherless. Soohan v. City of Philadelphia, 33 Pa. 9 (1859).

[3]Plaintiffs' allegations with respect to the lease to the Philadelphia Community College of certain property owned by the Girard Estate are insubstantial. The proof is merely that the College benefits from the terms of the lease, which is the product of arms-length dealing between the Estate and the Community College. There is no evidence that a special advantage—intended or otherwise—was conferred on the College by the City of Philadelphia or its instrumentalities.

which is presented is both substantial and troublesome. The facts themselves are not in dispute. Stephen Girard appointed the City of Philadelphia to be trustee of the College established under the terms of his will. The trusteeship eventually passed to the Board of Directors of City Trusts, an agency of the City. In 1957, the United States Supreme Court held that this trusteeship constituted governmental discrimination barred by the Fourteenth Amendment. *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U. S. 230 (1957). The Supreme Court did not, however, order the admission of the Negro plaintiffs in that case to the College. Instead, it remanded "for further proceedings not inconsistent with this opinion."

In supposed conformity to that mandate, the Orphans' Court of Philadelphia County removed the Board of Directors of City Trusts as trustee and appointed private persons, styled "Trustees of the Estate of Stephen Girard." The sole function of these substitute trustees was and is to administer Girard College, and they have continued in force the discriminatory policies prescribed by the will. The Supreme Court of Pennsylvania held that the Orphans' Court had acted properly, both in light of the U. S. Supreme Court's mandate and State law. Girard College Trusteeship, 391 Pa. 434 (1958), *appeal dismissed and cert. denied sub nom. Pennsylvania* v. *Board of Directors of City Trusts,* 357 U. S. 570 (1958). Since the only way the testator's will, as interpreted by the State courts, could be effectuated was by the appointment of non-public trustees, the Orphans' Court action was obviously the only remaining alternative to the admission of non-white applicants to the College.

Plaintiffs rely on the Supreme Court's recent decision in *Evans* v. *Newton,* 382 U. S. 296 (1966). That decision is controlling in this case, and we believe that its proper application requires that we sustain plaintiffs' claims for relief. In *Evans,* the testator devised land to the City of Macon, Georgia, to be used as a park for white persons only. The City eventually decided that it could not constitutionally deny access to Negroes and it permitted the multiracial use of the facilities, even though this was clearly proscribed by the restrictive terms of the will. Thereafter, individual members of the Board of Managers of the park brought suit in the State courts, demanding the appointment of substitute "private" trustees who could administer the will as it was written. The City next resigned as trustee, and the Georgia court accepted this resignation and appointed new trustees. The Supreme Court of Georgia affirmed this action, holding that State law required the appointment of new trustees so that the restrictive purpose of the trust would not fail.

The United States Supreme Court reversed, emphasizing that, "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. The action of a city in serving as trustee of property under a private will serving a segregated cause is an obvious example. See *Pennsylvania* v. *Board of Trusts, supra.*" 382 U. S. at 299. Expanding on this notion of "governmental character," the Court cited as other examples a privately owned and managed town, *Marsh* v. *Alabama,* 326 U. S. 501 (1946), and the elective process, *Terry* v. *Adams,* 345 U. S. 461 (1953). It is apparent that discrimination in these instances is *per se* constitutionally prohibited.

Apparently excluded from this *"per se"* category of quasi-public facilities are schools, for the Court was at pains to point out that, "If a testator wanted to leave a school or center for the use of one race only *and in no way implicated the State in the supervision, control, or management of that facility,* we assume arguendo that no constitutional difficulty would be encountered." 382 U. S. at 300 (Emphasis added).

Of course, Stephen Girard, like the testator in *Evans,* did implicate the State in the administration of Girard College: the only questions are whether the College could have been and in fact was subsequently disassociated from the organs of State control, direction, and supervision, and whether, in consequence, the school was effectively cleansed of its "governmental character." Perhaps more to the point, the question is whether the State has purged itself of the discriminatory connection.

Plaintiffs, citing *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), contend that the appointment of substitute trustees by the Orphans' Court was unconstitutional *per se.* We do not agree. In *Shelley,* the Supreme Court held that a State court could not enforce a racially exclusive restrictive covenant which would have impeded a sale of property by one consenting party to another consenting party. The Court did not hold, as would have been analogous to the case before us, that a prospective purchaser of property can force the owner to sell to him when the latter wishes to adhere to a restrictive covenant which purports to bar such sales. On the contrary, the Supreme Court stressed the fact that "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners

by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." 334 U. S. at 13. The distinguishing feature of the *Shelley* case was that the State courts had undertaken to enforce the restrictive terms of the agreements in a situation where "petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." 334 U. S. at 19.

In the case before us, we find no consensual understanding among the parties; Stephen Girard did not provide for non-white male orphans and the trustees have refused to depart from the terms of the will.

All matters involving decedents' estates necessarily implicate the Orphans' Court, whose responsibility it is to effectuate the intent of the testator, to guard zealously against unwarrantable interferences with the testamentary property itself or the purposes to which the property has been pledged. Though a testator evidence the most blatant racial animus, the Orphans' Court, although admittedly an agency of the State, is duty bound to supervise his testamentary affairs as long as it does not directly associate or implicate itself in the discriminatory purpose.

The justification for this rule lies in the importance which our society attaches to a testator's will, to a man's

right to dispose of his property in a manner which conflicts with neither explicit federal nor state law at the time of the bequest or at the time of its subsequent administration. That justification is especially prominent where a charitable trust is involved. Pennsylvania has determined that the dominant intent of Stephen Girard was to benefit poor, male, white orphans. See Girard College Trusteeship, 391 Pa. 434 (1958). Such determination represents a matter of State law, completely within Pennsylvania's sphere, and one by which we are bound. *Erie Railroad* v. *Tompkins,* 304 U. S. 64 (1938). In substituting new individual trustees in place of the City agency, the Orphans' Court was merely performing its traditional supervisory and administrative function of assuring the effectuation of the testator's intent as previously determined by Pennsylvania courts.

Mere supervision of and, if necessary, appointment of trustees by a probate court does not alone amount to a proscribed State entanglement. This is not to say that the nexus between the Trustees and the Orphans' Court is totally without significance, as we shall later point out. It is only to say that the substitution does not, in and of itself and standing alone, involve constitutional implications.

We are buttressed in our conclusion by the Court's studious avoidance in *Evans* of any reference to *Shelley.* By its silence, the Court seems to indicate that the mere substitution of trustees without more is not constitutionally objectionable. Something more is required; something which transforms the purportedly private activity into a public function. In *Evans,* it was the nature of the part as "an integral part of the City of Macon's activities" which worked the essential alchemy. "From the pleadings we assume it

was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption * * *. The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees." 382 U. S. at 301. In effect, the openness of the part, its "public" facade and function rendered it public as a matter of constitutional law, in the absence of record proof of a "change in municipal maintenance and concern over this facility." *Id.* As the Court concluded, "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." *Id.*

Evans represents a rather new departure from existing theories of State action; its own theoretical basis is, unfortunately, somewhat obscure. In essence, *Evans* holds that where actual State operation has transformed a public service-type enterprise into a governmental function, or where state control has confirmed the fact of such a subsisting function, the subsequent transfer of operating responsibility to private hands will not necessarily terminate the impetus of State involvement. This formula makes sense in the *Evans* case itself, which concerned a quasi-public park, open without restriction to all white members of the community and from all appearances no different from any other city park except in respect to the racial limitation.[4] But it is impossible to assess the applicability of *Evans* to this case

[4]Indeed, in view of the fact that the park was located in a Southern community, it may well have been that at one time all city parks were segregated, so that this park was exactly similar to every other park.

without first distilling some underlying principle from that opinion; mere factual comparison without philosophical foundation would be an exercise in futility.

We must start with the uncontrovertible proposition that private discrimination, however distasteful or invidious, is not prohibited by the constitutional strictures of equal protection. *Civil Rights Cases,* 109 U. S. 3 (1883). However, if the State or agencies of the State actively engage in or even sponsor racial discrimination, the provisions of the Fourteenth Amendment are called into play. *Reitman* v. *Mulkey,* U. S. , 35 U. S. L. W. 4473 (1967). The doctrine of State action must be subject to reasonable limitations. Quite obviously, the influence and beneficial activities of the State permeate virtually every area of human endeavor. There are few respects indeed in which the impact of governmental effort and energy is not felt. In a sense, almost everything we do is in part the product of or is facilitated by some State action.

Thus, it is not enough to say that "State action" is prohibited. As the Court in *Evans* acknowledged, "* * * generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (Burton v. Wilmington Parking Authority, [365 U. S. 715 at 722 (1961)]) can we determine whether the reach of the Fourteenth Amendment extends to a particular case." 382 U. S. at 299-300. Yet obviously some principles of general application must be formulated. It is in the creative endeavor to make those principles work that courts are continually called upon to test the validity of the underlying theses—and, in turn, are themselves tested.

The Supreme Court "* * * has never attempted the 'impossible task' of formulating an infallible test for determin-

ing whether the State 'in any of its manifestations' has become significiantly involved in private discrimination." *Reitman* v. *Mulkey,* U. S. , 35 U. S. L. W. 4473 (1967). However, the cases "* * * do illustrate the range of situations in which discriminatory state action has been identified. They do exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." *Id.* at .

The focus of our inquiry and, we believe, that of the Supreme Court, is *first,* the nature of the State involvement, and *second,* the nature of the institution concerned, be it park, school, or whatever. As we have already indicated, where the conscious *purpose* of the State action is to foster discrimination, the mere fact of such action requires constitutional sanctions. Thus, if the courts of Pennsylvania had acted to perpetuate discrimination at Girard College simply because it was their policy and purpose to foster racial segregation, without respect to the intent of the testator, we would have had little difficulty in disposing of this suit. But since that was not the case, we are required to make the two-fold inquiry implied by *Evans.*

The purpose of that inquiry is to ascertain whether the institution (here Girard College) is presently associated with the State in a manner which tends to suggest to the community that the institution's policy of racial discrimination is either practiced by or approved by public authority. This, we think, is the essence of *Evans* v. *Newton.* So, too, in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961), the governmental agency neither operated nor managed nor participated in the operation or man-

agement of the restaurant involved. Nevertheless, the Court held that the "State has so far insinuated itself" by the mere leasing of its property that discrimination was interdicted.

Far from abandoning the requirement of presently existing proscribed State action, those cases merely insist that we examine the whole course of conduct of the State with respect to the institution in question (including, of course, the appointment of substitute trustees) in order to determine whether the association has proved fatal to the discriminatory design and whether, in consequence, that design must now fail.

The quest is not for a scintilla of State action, for State action is ubiquitous and pervasive. The inquiry is properly directed to the type of State action involved, the extent to which the State thereby associates itself or is in the public view associated with invidious discriminatory purposes and policies, and, accordingly, the extent to which responsibility for the perpetuation of those invidious designs may be justifiably ascribed to the State itself.

The role of the court in evaluating these factors is a difficult one, but it is not unmanageable if the objectives remain clear. Whatever colorations the relevant factors may assume in the context of a particular case at a particular time, their significance may be properly focused by reference to the constitutional principles we have posited.

Much of the dissension within the Supreme Court itself as to the logical perimeters of the *Evans* decision can be explained by the absence of a full evidentiary record in that case. See the dissenting opinions of Mr. Justice Black and Mr. Justice Harlan. In effect, Mr. Justice Douglas, writ-

ing for the majority, found State action in the absence of record proof of disassociation from the public connections in the case of such an obviously public function as an open park, whereas Justices Black and Harlan stressed the necessity for affirmative record support of a continuing State involvement. In this litigation, we have the advantage of a full factual record to aid in our analysis of the relevant considerations to our decision.

We ask, *first,* what was and is the nature of the State involvement in Girard College? As in Evans, a city (later an agency of the city) was the named trustee of the institution. As such, it was responsible for the supervision, direction and control of the College. At that point, the State involvement was complete. Furthermore, it was an involvement of the most notorious nature; there are few citizens of Philadelphia who are not well-acquainted with the history of Girard College's steadfast intransigence to the demands of non-white applicants and the heavily publicized role which an agency of the City played in the denial of access to those applicants. *Cf. Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961); *Reitman* v. *Mulkey,* U. S. (1967), *supra.*

Of course, the public trusteeship constituted nothing less than the active participation of the State in the very act of racial discrimination. Inevitably, the Supreme Court declared in the first Girard College Case that this conduct was State action prohibited by the Fourteenth Amendment.

After the removal of the Board of Directors of City Trusts and the appointment of substitute private trustees, the actual practice of discriminatory conduct by an acknowledged agency of the State ceased. However, the question

further posed by *Evans* is whether the "momentum", if any, of 128 years of direct State involvement continues to brand discrimination at Girard College with the imprimatur of State approval. We think that it does.

There is no doubt in our mind that the substitution of trustees accorded with the Orphans' Court's understanding of the testamentary intent of Stephen Girard and involved, as such, no element of invidious discrimination on the part of that judicial body. However, that same court has exhibited a significantly different association with and concern for the Girard Estate from that evinced for other trusts. Thus, the formal Orphans' Court proceeding, initiated by that Court itself, in which the newly appointed Trustees were sworn to uphold Girard's will, suggested that the Orphans' Court had a very special interest in the all-white institution which transcended mere testamentary supervision. Likewise, the two visits of the Judges of the Orphans' Court to Girard College in 1959 and 1961 and the presentation to the Trustees on the latter occasion of certificates bearing the name of the Court and the appreciation of its members implied approval of defendants' discriminatory conduct. In the same way, the fact that the trustees of this trust, as opposed to other charitable trusts, account to the Orphans' Court at regular intervals (as specified by the Court) and that the trustees may be removed and successors appointed at will by the Court affords the appearance of continuing interest in a trust which is, on its face, distinguishable from most other trusts only in its racial exclusivity.

We emphasize again that we do not in any manner mean to suggest that the Orphans' Court or any other State tri-

bunal has consciously and purposefully promoted or sponsored the discriminatory design at Girard College. However, we must conclude that the City trusteeship—itself unconstitutional—and the ensuing attempt to alter the nature of that trusteeship—itself not unconstitutional—have resulted in the institutionalization of Girard College as a governmentally sanctioned center of racial bias. We hold only that in this case, the transfer of immediate supervisory control to private trustees by the Orphans' Court failed to effectively disassociate the State from the discrimatory policies and purposes which the State operation of the school had come to embody.

Moreover, there is not insubstantial evidence of subsisting connections between Girard College and agencies of the Commonwealth which afford further grounds for inferring a proscribed involvement in the discriminatory design. Thus, today as from the inception of the school's operation, regular reports to the State Legislature by the College regarding its activities continue to associate the State with the institution's discriminatory conduct. Defendants urge that this fact is irrelevant because the annual reports are not required by the State, but only by the will of Stephen Girard. This argument is plainly without merit, for indeed, the City trusteeship was of the testator's making as well. The first Girard College Case demonstrated that it matters not at all what the source of the tie between the State and the facility is. It is significant only that the involvement exists and that it lends sustenance, actual or apparent, to a policy of racial discrimination.

Surely, the fact that the State Legislature receives reports regarding the conduct of an institution of whose discriminatory operation it must be aware cannot be passed

off as wholly irrelevant. If the testator required such reports, he must have contemplated at the very least potential supervision by the Legislature, not to mention the many benefits which might flow from this special relationship.

In addition, it must be noted that Girard College is subject to the general supervision of the State Department of Public Instruction, the State Department of Welfare, and other agencies concerned with the education and welfare of the young.[5] And it is undisputed that the College enjoys the substantial benefits of tax exemptions and other special concessions from public agencies. Of course, such controls and concessions constitute State action; the question is whether the State action is prohibited. We must conclude that, standing alone, the supervision which the State exercises over even private schools and the special benefits which it attaches to non-profit or charitable educational institutions do not involve prohibited State action *per se*.[6] But such factors are undeniably relevant in ascertaining whether the total State involvement is such as to afford to the practice of racial discrimination by a State-subsidized or supervised institution an aura of public approval and sanction. *Cf. Eaton* v. *Grubbs*, 329 F. 2d 710, 713 (C. A. 4, 1964).

In the context of this case, we must conclude that the advantages which Girard College derives from presently existing public services and supervision, when coupled with the presence of additional instances of State involvement, have implicated the State in the discriminatory design. It is the quality of Girard's environment which the State su-

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[5]We discussed this supervision in some detail in another connection in our second opinion. 260 F. Supp. 358.

[6]If the rule were otherwise, no privately endowed school could discriminate without constitutional consequences.

perintends: yet that environment excludes a substantial segment of the State's population. It is the school's dedication to enlightenment which the state rewards: yet that enlightenment is tarnished by the pervasive effects of racial discrimination. The State, by approving the College as a fit place for the education and upbringing of young boys and by crowning that approval with the legislative grace of tax exemption, has in some measure aided an invidious discriminatory policy; that much is clear. When combined with the history of direct State operation and the not wholly unambiguous manner in which that control was sought to be terminated, we think the conclusion ineluctable that the College has not purged itself of critical State involvement nor has the State erased the impression of public approval which long attached to the school's racial policies.

We turn, then, to the *second* inquiry: What is the nature of the institution, here Girard College, in terms of the services it performs in the community?

In *Evans,* the Court's ultimate holding was "buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race." 382 U. S. at 301. Thus, partly as a result of the long period of State involvement and partly because of the inherent nature of the facility, the park was subject to the constitutional requirements of the Equal Protection Clause. However, the mere fact that the park performed a function which was also performed directly by muncipal authorities was clearly deemed insufficient, standing alone, to sustain a constitutional claim. "The range of governmental activities is broad and varied, and the fact that government has engaged in a

particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." 382 U. S. at 300. The nature of the service is only one relevant factor to be considered.

Admittedly, the public character of the community services provided by the park in *Evans* was more obvious than those provided by Girard College. A park, open to the general public with the sole exception of non-whites, is the sort of facility which gives every appearance of State participation in or approval of the discriminatory design. There was nothing to distinguish this park from every other park in the community. Since other parks were operated by the municipality, the only reasonable inference was that this park too either was operated by the city or enjoyed the explicit approval of State agencies in its discriminatory operation. As such, it was "municipal in nature."

Here, the record establishes that Girard College was never a "public school" in the sense that it was ever administered by the Philadelphia Board of Education. However, unlike other "private" schools whose students can and do pay tuition, Girard undeniably performs a service to its students which would otherwise *have* to be performed by the public school system, since students at Girard are, by definition, unable to pay for education. In addition, there is substantial evidence of collaboration between the College and principals at various City public schools. Representatives of the College have maintained contacts with public school officials for the purpose of soliciting applications from students attending public schools who would be qualified to attend Girard College. Thus, it is a reasonable inference that public school authorities have referred potential

applicants to an institution which they must have known engaged in racial discrimination. The effect of this aspect of the College's recruitment program has been to associate the institution with the City's educational system in a manner which could only evidence mutual respect and esteem. Thus, it appears that the College relies in part on the resources of the City schools, and the public schools look upon the College as an obvious agency to which to refer "qualified" students, who, by definition, must be "white."

The park in *Evans* was open to the public in general, there being "no selective element other than race." In this case, the relevant sector of the public to be considered is school-age male orphans, since as defendants have many times reminded us, Girard College is as much an orphanage as it is a school, with some two-thirds of its budget allocated to the care, as opposed to training, of its wards. By their very nature, orphanages are restricted to poor children. As to the sex limitation, it is commonly accepted for reasons of administrability as well as tradition in such institutions. Furthermore, the record reveals that the Trustees have pursued a continuing policy of vigorous recruitment of applicants, without regard to their background, social status, intelligence, religion, or any other factor which might limit the broad (if not heavily populated) class of poor male orphans, other than the factor of race. While all applicants are tested extensively, the important fact is that no initial application is discouraged, except those from Negroes; quite the contrary, every effort is made to attract as many potential applicants as possible.[7]

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[7]This recruitment effort, which at one time even included public advertising, was the subject of proof early in the case. See 260 F. Supp. 358. Significantly, the intelligence of Girard College students is not exceptional, although the integrity and initiative of its graduates are unusual.

Thus, while Girard College is not a facility of general access to the public or even necessarily to the school-age population, it has always held itself out as an institution whose benefits are available to *any* needy, fatherless boy—as long as he is "white." In this sense, the College has become assimilated to a public boarding school or orphanage, "municipal in nature," the sole distinguishing feature of which at the present time is its racial restriction.

Surely, there is no question that State-sponsored racial inequality, as evidenced by State participation in or association with the discriminatory design, must be proscribed wherever it is found. On this, all of the parties to this litigation are wholly agreed. Sifting and weighing the factors of State involvement, we find it impossible to conceive that racial discrimination is constitutionally permissible at Girard College. The founder himself entwined the State in its administration, without even an articulated thought of some possible substitute. That entanglement persisted for over a century and a quarter. It was overtly removed by the unilateral action of a State agency, the Orphans' Court, which thereupon uniquely swore in the successors, binding them under State oath to carry out the founder's discriminatory policies,—and then officially thanked them for doing so. The State Legislature periodically receives reports, implicit in which is the perpetuation of discrimination. The Orphans' Court has demanded, uniquely as to this trust, periodic accountings and has, for all the record shows, accepted and approved them. Pennsylvania has overseen and approved both the education and upbringing of students at Girard College and the operation of the institution as a school and as an orphanage, serving an obviously public function. Recognizing the unavailability of an "infallible test," we

nevertheless find it logically and legally impossible to escape the conclusion that racial exclusion at Girard College is so afflicted with State action, in its widened concept, that it cannot constitutionally endure. Since the strictures of the Fourteenth Amendment apply to the administration of the institution, it may no longer deny admission to applicants simply because they are not "white."

The foregoing shall be considered our findings of fact and conclusions of law pursuant to F. R. Civ. P. 52(a). In addition, the findings of fact in our opinion and decree of November 2, 1966 are re-affirmed. To the extent that they are relevant, the following requests of the parties for findings of fact are *granted:*

Plaintiffs' Nos. 1 through 5; 7 through 11-60; 11-62 through 11-68; 13; 16 through 23; 27; 28; 29; 31; 32; 40; 42; 43.

Defendants' Nos. 1 through 4; 9; 11; 12; 14 through 21; 23 through 34; 40 through 44.

The following requests for findings of fact are *denied*:

Plaintiffs' Nos. 11-61; 12; 14; 15; 24; 25; 26; 30; 33 through 38; 41.

Defendants' Nos. 5 through 8; 10; 13; 22; 35 through 39.

To the extent that the parties' requests for conclusions of law are consistent with the foregoing opinion, they are *granted;* to the extent that they are inconsistent, they are *denied.*

There being "no just reason for delay," F. R. Civ. P. 54(b), we direct the entry of judgment for plaintiffs on Count One, in accordance with the appended decree.

It is so ORDERED.

Opinion and Order of
United States District Court (E. D. Pa.) (7/5/67)

DECREE

AND NOW, this 5th day of July, 1967, it is ORDERED AND DECREED that:

(1) This action shall be maintained as a class action under Federal Rule of Civil Procedure 23(b) (2). The class consists of all poor, male orphans who would be eligible for admission to Girard College except for the fact that they are not "white."

(2) Defendants are permanently enjoined from denying to members of the class [denominated in Paragraph (1) of this Decree] admission to Girard College on the sole ground that they are not white, provided that they are otherwise qualified for admission.

(3) The enforcement of this injunction is stayed pending application to and action by the Court of Appeals for such further stay as that Court deems proper, pending appeal.

BY THE COURT

JOSEPH S. LORD, III

J.

Opinions and Order of United States Court of Appeals for Third Circuit (3/7/68)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16721

COMMONWEALTH OF PENNSYLVANIA et al.,

v.

REVELLE W. BROWN et al.,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 28, 1967

Before STALEY, *Chief Judge*, and McLAUGHLIN, KALODNER, SEITZ and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT

(Filed March 7, 1968)

Opinions and Order of United States Court of Appeals for Third Circuit (3/7/68)

By McLAUGHLIN, *Circuit Judge.*

The problem here arises from the will of Stephen Girard, a Philadelphia, Pennsylvania resident who died in 1831. In his will, dated 1830, he laid down his fundamental theses that he had "been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed; * * *." Continuing, he said "* * * I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of public funds." He coupled this with his statement of heartfelt interest in the welfare of Philadelphia and his desire to improve it in its Delaware River neighborhood for the benefit of the health of its citizens and so that the eastern part of the city would correspond better with the interior. So inter alia he left the valuable residue and remainder of his real and personal property to "The Mayor, Aldermen and citizens of Philadelphia, their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned and declared * * *." The will went into considerable particulars regarding the Girard Philadelphia and Kentucky property. Concerning a personal estate bequest of two million dollars for the College the will outlined at length where it would be located and in great detail the exact construction of the College and outbuildings, etc. The will also gave five hundred thousand dollars to Philadelphia for various public improvements. The Commonwealth of

Pennsylvania was bequeathed three hundred thousand dollars for internal improvement by canal navigation. This last bequest was conditioned upon the Commonwealth passing certain laws helpful to the testator's contemplated improvement of Philadelphia and for the desired objectives of Girard College. All the suggested assisting legislation was enacted by the Commonwealth in due course.

Mr. Girard stated specifically in his will:

> "In relation to the organization of the college and its appendages, I leave, necessarily, many details to the Mayor, Aldermen and citizens of Philadelphia and their successors; and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia, will observe and evince especial care and anxiety in selecting members of their City Councils, and other agents* * *."

He provided that the College accounts be kept separately so that they could be examined by a committee of the Pennsylvania legislature and that an account of same be rendered annually to said legislature together with a report of the state of the College. Philadelphia accepted the bequests and by ordinance set up a plan to administer the College by a Trusts Board. In 1833 a building committee of the City Council was appointed, a president of the College was chosen under an ordinance created for that purpose and the cornerstone of the main building laid. Construction was concluded in 1847 and the College opened the first of the following year. Down to 1869 the City Council operated the College directly, first by way of the trustees

until 1851 when the latter offices were abolished, and the Council again took over direct management. In 1869 the Commonwealth enacted a law which gave Philadelphia a local Board of Trusts to take over the control of Girard College. From that date the Board of City Trusts remained in charge of the College until 1958. Broadly summing up the Commonwealth and City's intimate association with Girard College the District Court, with full justification in the record, found as fact that:

> "Beginning in 1831 and continuing to date, the Commonwealth of Pennsylvania and the City of Philadelphia, by the enactment of statutes and ordinances, by the use and supervision of public officials, appointed by legislative and judicial bodies, by rendering services and providing tax exemptions, perpetual existence and exemption from tort liability, have given aid, assistance, direction and involvement to the construction, maintenance, operation and policies of Girard College."

It is important to note in this sequence that Philadelphia has made a consistently brilliant showing through the years in its management of the funds and real property from the Girard estate for the College. The money bequest amounted to six million dollars. This was increased to ninety million dollars plus by 1959. The various estate properties given the City for the College were not allocated any book value by the estate. These have insurable value at this time of $42,000,000.

In 1954 two applicants requested admission to the College. They were fully qualified but were refused because they were Negroes. They brought their cause to the United

States Supreme Court which held in that suit, titled Pennsylvania, et al. v. Board of Directors of the City of Philadelphia, 353 U. S. 230, 231 (1958):

> "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

The Supreme Court of Pennsylvania on remand took none of the plainly indicated proceedings called for by the United States Supreme Court. It simply remanded the litigation to the Orphans' Court of Philadelphia County.[1] That court, without notice or opportunity for

[1]As rightly found by the District Court:

> "In 1959, after the decision of the United States Supreme Court in Pennsylvania v. Board of Directors, 353 U.S. 230 (1957), the Legislature of Pennsylvania enacted a statute granting the Orphans' Court the power and the duty to appoint substitute trustees for the property of minors, when a previous trustee which was a political subdivision is removed 'in the public interest,' and authorized a substitute trustee to invest such property of minors committed to their custody. The Act also contained other enabling legislation, without which the present defendants would be unable to carry out their duties. Act of November 19, 1959, P.L. 1526 (Exh. P-51 (10)). The Legislature Journal of the Senate of the Commonwealth of Pennsylvania shows that this statute was passed specifically as enabling legislation in aid of Girard College (Exh. P-51 (10))."

the plaintiffs to do anything and with no request from the City or other source whatsoever, on its own initiative ousted Philadelphia as trustee and installed in place of the City Board, persons of its own choosing. There is disagreement between the parties with respect to the method used for the selection of the new trustees. But it is conceded by appellants regarding prior notification by the Orphans' Court to its choices that, "Certainly no court would appoint an individual to a position of such responsibility without first affording him an opportunity to refuse." The record does show clearly that one of the court trustees testified that he was telephoned by one of the Orphans' Court judges prior to the appointments order being filed and told that the court had appointed its own trustees of which he was one. It is also in the record that the new trustees. as stated by one of them. were sworn in by at least one of the Orphans' Court judges and that included in their oath was "* * * that we would undertake to manage the will of Stephen Girard in accordance with the way it was written." The said trustee, referring to that part of the oath, further mentioned "That is what we all assumed anyhow." We think the foregoing factual narrative demonstrates that the Orphans' Court of Philadelphia County has been substantially involved with the supervision of the Girard Estate.

The Philadelphia City Trustees took no appeal from their ouster. The children plaintiffs did. The Pennsylvania Supreme Court found that the Orphans' Court action was not inconsistent with the mandate of the United States Supreme Court or the Fourteenth Amendment or the Girard will. Application for certiorari was denied by the United States Supreme Court, 357 U. S. 570 (1958).

The present litigation was instituted in the United States District Court for the Eastern District of Pennsylvania. The trial judge originally passed solely upon the question of whether Girard College was within the jurisdiction of the Pennsylvania Public Accommodations Act of June 11, 1935, P. L. 297, as amended by the Act of June 24, 1939, P. L. 872. The Court held it was within Sections (a) and (c) of the Act and not within the proviso of Section (d). This Court reversed that finding and returned the suit to the District Court for trial on the merits of Count 1 of the complaint which charges that "The refusal of the trustees of Girard College to admit applicants without regard to race violates the Constitution of the United States of America and applicable Federal statutes."

Appellants argue that they have not violated the equal protection clause of the Fourteenth Amendment by denying admission to individuals because of their color. In support of this they cite some Pennsylvania decisions including the State Supreme Court Girard College opinion on the remand of the United States Supreme Court to that State Court "for further proceedings not inconsistent with this opinion." What the State Court did was turn the matter over to its Orphans' Court which eliminated the City as trustee and installed its own group, sworn to uphold the literal language of the Girard will, a move effectively continuing the very segregation which had been condemned by the United States Supreme Court. True, the latter had denied the application for certiorari. Times without number that Court has plainly ruled that there is no inference permissible from its denial of application for certiorari, favorable or unfavorable to either side of a litigation. Certainly in the whole muddy situation flowing

from the State excision of the City Board, thereby taking away the linchpin of the Girard will, the then existing state litigation picture did not bring into the necessary sharp focus, the set piece maneuver which had completely circumvented the Supreme Court's directive. We, however, as above seen, do have all of that amazing effort to maintain Girard's discriminatory status before us in its true perspective.

Even in the above short resumé of the conception, creation and functioning of Girard College, the close, indispensable relationship between the College, the City of Philadelphia and the Commonwealth of Pennsylvania intended by Mr. Girard, meticulously set out in his will and faithfully followed for one hundred and twenty-seven years is self evident.[2] The ironic result of the removal of the City Trustees is that Pennsylvania's involvement with Girard College is far more powerful than was provided for by Mr. Girard. The Commonwealth's Orphans' Court, through its assumed power of appointment and reappointment of the Trustees, is significantly concerned with the current administration of the college.

On the whole vital Commonwealth and City relationship to Girard College shown we must agree with Judge Lord in the District Court, that the facts in Evans v. Newton, 382 U. S. 296, 301, 302 (1966) are fairly comparable to those in this appeal and that the decision of the Supreme Court therein governs the issue before us. In

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[2]So that there will be no possible cause for confusion, we note that the general topic of the sanctity of wills is not before us. Our total concern in this cause to which our decision is confined is a will in which the testator has deliberately and specially involved the State in the designated use of his testamentary property.

Evans a tract of land was willed to the Mayor and City Council of Macon, Georgia, as a park for white people, to be controlled by a white Board of Managers. The city desegregated the park and the managers thereafter sued the city and the trustees of the residuary beneficiaries, asking for the city's removal as trustee and the appointment of private trustees to enforce the racial limitations of the will. The Court accepted the city's resignation and appointed three new trustees. The State Supreme Court upheld the terms of the will and the appointment of the new trustees. The United States Supreme Court reversed. Mr. Justice Douglas for the Court in the opinion said as to the park in issue:

> "The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment * * *.
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> "Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. We may fairly assume that had the Georgia courts been of the view that even in private hands the park may not be operated for the public on a segregated basis,

> the resignation would not have been approved and private trustees appointed. We put the matter that way because on this record we cannot stay that the transfer of title per se disentangled the park from segregation under the municipal regime that long controlled it."

We think also that the Supreme Court's landmark decision in Shelley v. Kraemer, 334 U. S. 1, 20 (1948) surely points to the affirmance of the instant judgment in accordance with the justice which must be done in this case. The state courts in Shelley had enforced restrictive real estate agreements. The Court by Chief Justice Vinson held:

> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.
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> * * *
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> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought

> to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."

See also Barrows v. Jackson, 346 U. S. 249 (1953) and Sweet Briar Institute v. Button, 12 Race Rel. L. Rep. 85 (W. D. Va., 1967), rev'd per curiam, 387 U. S. 423, decision on the merits, Civil No. 66-C-10-L (W. D. Va., filed July 14, 1967). In Sweet Briar the trustees of the Institute sought to enjoin enforcement by the state attorney general of a racial restriction contained in the will establishing and funding the college. On motion of the defendant, the three judge Court abstained until such time as the college carried its prior case through the state courts. The Supreme Court reversed, stressing strongly, Section 202 of the Civil Rights Act of 1964, 42 U. S. C. § 200a-1 (1964), and ordered the District Court to determine the case on the merits. On remand, that Court entered a permanent injunction against enforcement of the racial restriction by the State of Virginia, holding that:

> "The State cannot require compliance with the testamentary restriction because that would constitute State action barred by the Fourteenth Amendment. This was the express holding in the Girard Case." F. Supp. (W. D. Va., 1967).

Girard's definitive position in this period of more than ever being operated by an agency of the state does not

simply emanate from the momentum of the Commonwealth and City legitimate participation in the establishment of Girard and its institutional life from its beginning to the present moment. It is in addition, as we hold, the obvious net consequence of the displacement of the City Board by the Commonwealth's agent and the filling of the Girard Trusteeships with persons selected by the Commonwealth and committed to upholding the letter of the will. Those radical changes pushed the College right back into its old and ugly unconstitutional position. Had the City Trustees been left undisturbed it is inconceivable that this bitter dispute before us would not have been long ago lawfully and justly terminated. It is inconceivable that those City Trustees would not have with goodwill opened the College to all qualified children. Given everything we know of Mr. Girard, it is inconceivable that in this changed world he would not be quietly happy that his cherished project had raised its sights with the times and joyfully recognized that all human beings are created equal.

We do not consider the move of the state court in disposing of the City Trustees and installing its own appointees to be a nonobvious involvement of the State as mentioned in the test outlined in Burton v. Wilmington Parking Authority, 365 U. S. 715, 722 (1961). The action in this instance and its motivation are to put it mildly, conspicuous. And what happened to Girard does "* * * significantly encourage and involve the State in private discriminations." Reitman v. Mulkey, 387 U. S. 369, 381 (1967). As the Court there said by Mr. Justice White, "We have been presented with no persuasive considerations indicating that this judgment should be overturned."

The judgment of the District Court will be affirmed.

KALODNER, *Circuit Judge,* concurring in the result.

I would affirm the Decree of the District Court on the ground that the removal in 1957 of the Board of Directors of City Trusts as trustee of the Stephen Girard Estate by the Orphans' Court, and its appointment of substituted individual trustees, for the avowed purpose of carrying out the racial exclusionary clause of Girard's Will, contravened the Fourteenth Amendment of the United States under the doctrine of Shelley v. Kraemer, 334 U. S. 1 (1948) and its progeny.[1]

The Fourteenth Amendment is contravened under the *Shelley* doctrine, where there is "active intervention of the state courts, supported by the full panoply of state power"[2] in the furtherance of enforcement of restrictions denying citizens their civil rights because of their race, color or creed.

In the instant case, the Orphans' Court had two alternative courses of action following the ruling of the Supreme Court of the United States in Pennsylvania v. Board of Directors of City Trusts, 353 U. S. 230 (1957), that the Board's denial of admission to Girard College of negro male orphans pursuant to the racial exclusionary clause of Stephen Girard's Will constituted state action in violation of the Fourteenth Amendment.

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[1]Barrows v. Jackson, 346 U. S. 249 (1953).

[2]Shelley v. Kraemer, 334 U. S. 1 at page 19. At page 14 of *Shelley* the Court said:

> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. . . . In *Ex Parte Virginia,* 100 U. S. 339, 347 (1880), the Court observed; 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way'."

The Orphans' Court could have pursued the alternative of directing the Board of Directors of City Trusts to admit negro orphans to Girard College. Instead, it *sua sponte* pursued the alternative course of removing the Board and appointing individual private trustees in its stead so as to permit continuance of the discriminatory admission policy dictated by Girard's Will.[3]

That the alternative action taken by the Orphans' Court was for the avowed purpose of giving effect to the racial exclusionary clause of Girard's Will is explicitly spelled out in the Orphans' Court opinion accompanying its Decree of September 11, 1957 which removed the Board of Directors of City Trusts as trustee of the Girard Estate, "effective upon the appointment of a substituted trustee by this court."[4]

In this Opinion, Girard's Estate, 7 Pa. Fiduc. Rep. 555, (1957), the Orphans' Court said at pages 557-558:

> "The Supreme Court of the United States has ruled, as a matter of federal constitutional law, that the Board of Directors of City Trusts of the City of Philadelphia is an agency of the State of Pennsylvania and consequently forbidden by the Fourteenth

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[3]The Orphans' Court in pursuing this alternative course acted in conformity with the holding of the Supreme Court of Pennsylvania, in Girard Will Case, 386 Pa. 548, 566 (1956) that should the Supreme Court of the United States hold, as it later did, that the Board of Directors of City Trusts could not carry out the exclusionary policy of Girard's Will, that the Orphans' Court could then appoint another trustee who could do so.

[4]The Orphans Court Decree of October 4, 1957, substituting thirteen private citizens as Trustees of the Stephen Girard Estate, is reported at 7 Pa. Fiduc. Rep. 606.

> Amendment from operating, even as a trustee of private funds, an establishment which excludes all but "poor white male orphans."
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> * * *
>
> "The Supreme Court of Pennsylvania, which is the final arbiter of our state law, has unequivocally stated that if, for any reason, the Board of Directors of City Trusts of the City of Philadelphia cannot continue to administer the trust in accordance with testator's directions, *it becomes the duty of this court to remove it as trustee and to appoint a substituted trustee which can lawfully administer the trust in the manner prescribed by the testator.*
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> * * *
>
> "In order to harmonize the opinions of the United States Supreme Court and the Supreme Court of Pennsylvania, we hold: (1) *that the primary purpose of the testator to benefit "poor white male orphans," only, must prevail; and* (2) *that the disqualification of the Board as trustee of this estate by the United States Supreme Court requires us to remove it from the adminstration of the trust and to appoint a substituted trustee, not so disqualified."* (emphasis supplied)

The Supreme Court of the United States has recently ruled that in examining the constitutionality of a state act the reviewing court (1) must consider the act "in terms of its 'immediate objective', its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment' ",[5] and, (2) must "assess the potential impact of

[5]Reitman v. Mulkey, 387 U.S. 369 (1967) at page 373.

official action in determining whether the State has significantly involved itself with invidious discriminations".[6]

The stated rule is, of course, applicable to the action of a state court.

Applying the principles above stated to the instant case, I am of the opinion that the Orphans' Court "significantly involved itself with invidious discriminations" when it removed the Board of Directors of City Trusts and appointed individual trustees of the Estate of Stephen Girard for the express purpose of effectuating the racial exclusionary clause in Girard's Will, and thereby brought itself within the ambit of the *Shelley* doctrine.

As the *Shelley* case said at page 18:

> ". . . it has never been suggested that state court action is immunized from the operation of those provisions [14th Amendment] simply because the action is that of the judicial branch of the state government."

For the reasons stated I would confine the scope of our affirmance of the District Court's Decree to the ground assigned at the outset of this concurring opinion.

VAN DUSEN, *Circuit Judge,* concurring:

I concur in the result reached by the majority opinion, but respectfully dissent from much of the language used.

Specifically, I disagree with the implication from the statements that the state courts in 1957 installed their own group of trustees "sworn to uphold the literal language of the Girard will" (and similar phrases). Such charac-

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[6]Id. at page 380.

terizations given to the actions of the Pennsylvania courts by the majority opinion seem to me unnecessary to the proper decision in this appeal. There is no necessary basis in this record to so criticize either the able Pennsylvania judges, who have so conscientiously handled the litigation arising from the Girard Trust, or the distinguished and dedicated trustees, who have contributed unselfishly so much to this important charitable enterprise, acting under the advice of their able counsel, for many years. This appeal is being decided on the basis of the present decisions of the United States Supreme Court in a field where the "federal role" is more "pervasive" and "intense" today than it was several years ago. *United States* v. *Price,* 383 U. S. 787, 806 (1966). Recent decisions of the Supreme Court, particularly in light of forceful dissents by Mr. Justice Harlan, make clear that the Fourteenth Amendment does not now permit the discriminatory operation of a charity like Girard College if the operation of that discrimination receives support from certain types of "state action."

Of the forms or types of "state action" in aid of discrimination that the Supreme Court has held render the discrimination unconstitutional, that in *Reitman* v. *Mulkey,* 387 U. S. 369 (1967), seems most clearly apposite to the facts of this case.

The decision of the United States Supreme Court in 1957 (353 U. S. 230) settled the question of whether the discrimination at Girard College was then unconstitutional state action. The same discrimination exists today and this appeal asks whether the unconstitutionality also remains because prohibited state action supports the discrimination. The answer is yes. When the Orphans' Court, on its own motion and without formal hearing, removed the

Board of Directors of City Trusts and appointed "private" trustees in their place, such affirmative state action constituted the "encouragement" of discrimination held to violate the Fourteenth Amendment in *Reitman* v. *Mulkey, supra,* at 376. The state did not make itself merely neutral. Just as the California court did in *Reitman* v. *Mulkey,* this court can examine the constitutionality of such state action "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment,' " 387 U. S. at 373. *Cf. Burton* v. *Wilmington Pkg. Auth.,* 365 U. S. 715, 722 (1961). The record of the discrimination at Girard College after the 1957 United States Supreme Court decision makes it clear that the further "state actions" of the Pennsylvania courts did not "cure" the unconstitutionality, but perpetuated it by affirmatively encouraging continued discrimination. With hindsight it is clear that no reason exists for the deviation from Girard's will to appointing private trustees, except for its allowing compliance with the "white orphans" provision. And it is likewise an inescapable conclusion that the substitution of trustees in 1957 encouraged compliance with the "white" provision that has lasted for over 10 years. The state action that continues today in the Orphans' Court-trustee relationship is the "encouragement" of discrimination first given by the original appointment of the individual trustees.

Even clearer state action of "encouragement" is found in the statute passed by the Pennsylvania Legislature after the Supreme Court of Pennsylvania approved the substitution of private trustees. The Act of November 19, 1959, P.L. 1526, authorized *ex post facto* the Orphans' Courts' actions, and further implemented the change-over by fully empowering the new private trustees to serve in place of

the Board of City Trusts as guardians of the boys attending Girard College and to set up a common trust fund for their property. The same Act also repealed several prior laws passed to aid Girard College. Such affirmative legislative action, as an attempt to render a state neutral with respect to otherwise unconstitutional discrimination, makes *Reitman* v. *Mulkey* still more apposite.

When Stephen Girard deliberately and pointedly chose to involve the State in the "private" charitable conduct of his school (as was decided at 353 U. S. 230), he ran the risk that Philadelphia might not accept the trust, or might be unable to administer it, or might be subsequently unable to act because the federal constitution was changed (as occurred when the Fourteenth Amendment was passed). It is in this unique sitiuation of a testator's deliberate provision for a major role for the state in his charitable scheme, that the action of the state courts rises to the level of unconstitutional state action. The charitable scheme chosen by Girard might as easily have become invalid due to a change in the rule against perpetuities or some other limitation imposed by society on the unlimited rights of private property at death. See *Commonwealth of Pennsylvania* v. *Brown*, 260 *F. Supp.* 323, 357 (E. D. Pa. 1966).

JUDGMENT

This cause came on to be heard on the record from the United States Disrict Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 5, 1967, be, and the same is hereby affirmed, with costs.

March 7, 1968